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In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES E. PEURIFOY, PAUL V. STINES AND BETTY O. STINES, JOHN S. HALL AND DORIS D. HALL, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 910

JAMES E. PEURIFOY, PAUL V. STINES AND BETTY O. STINES, JOHN S. HALL AND DORIS D. HALL, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. 4a–14a) are reported at 27 T. C. 149. The opinion of the Court of Appeals (Pet. 15a–21a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 11, 1957. By order of Mr. Justice Whittaker, the time for filing the petition for a writ of certiorari was extended to April 11, 1958. The petition was filed on April 9, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether, in the particular circumstances of this case, amounts expended by taxpayers for board and lodging while employed at a job site for 20½, 12½ and 8½ months, respectively, and for transportation therefrom to their family residences after termination of the employment, are deductible business expenses under Section 23 (a) (1) (A) of the Internal Revenue Code of 1939 or are nondeductible personal and living expenses under Section 24 (a) (1).

STATUTES AND REGULATIONS INVOLVED

Sections 22 (n), 23 (a), and 24 (a) of the Internal Revenue Code of 1939, and Sections 39.22 (n)–1, 39.23 (a)–1, and 39.23 (a)–2 of Treasury Regulations 118, are set forth in the Appendix, *infra,* pp. 9–12.

STATEMENT

The facts as found by the Tax Court (Pet. 5a–10a) may for present purposes be summarized as follows:

The taxpayer James E. Peurifoy is a pipe welder. Since August 13, 1951, he has been a member of Local No. 329, with headquarters in Wilmington, North Carolina, of the trade union known as the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. The taxpayer Stines is a journeyman plumber, and the taxpayer Hall is a welder. Since 1947 and 1952, respectively, they have been members of Local No. 725 of the same union, with headquarters at Raleigh, North Carolina. They all obtain employment through their local unions, which send them to various work sites, some local and

some in other jurisdictions, where they are then hired by the employer. (Pet. 5a–6a.)

The taxpayer Peurifoy is unmarried. During the entire year of 1953, he owned and maintained a residence at Kure Beach, North Carolina, which is about 20 miles from Wilmington. He actually resides there when he is employed in the vicinity of Wilmington and returns to this residence on weekends if the place of employment is within a reasonable distance. He uses his own automobile for transportation. (Pet. 6a.)

From March 10, 1952, until November 20, 1953 (20½ months), he was employed by the Grinnell Company of Charlotte, North Carolina, to work on the duPont plant at Kinston, North Carolina. While so employed, he roomed and boarded near Kinston and from January 1, 1953, through November 20, 1953, he expended for room and board the sum of $496. The distance from his home in Kure Beach to the duPont plant is approximately 122 miles. The cost to him of driving his automobile from Kinston to Kure Beach after termination of this employment was $8.54. (Pet. 6a.)

Prior to his employment at Kinston, Peurifoy worked on a paper mill at Acme, North Carolina, for seven months. After his employment at Kinston, he worked at various places in North Carolina for 17½ months, three months, and two weeks, respectively, and at Barberton, Ohio, for one week. (Pet. 6a.)

In 1952 and 1953, the taxpayer Paul V. Stines and his wife maintained a residence in Raleigh, North

Carolina. His wife and their minor child actually resided there during all of 1953. (Pet. 7a.)

Since 1947, when he became a member of the union, Stines has had about 30 jobs ranging in duration from two weeks to over a year. He worked for one employer for over two years but on different jobs in different locations. (Pet. 7a.)

He was employed by the Grinnell Company of Charlotte, North Carolina, to work on the duPont plant at Kinston, North Carolina, from March 26, 1952, until about April 10, 1953 (12½ months), when he was discharged. While so employed, he rented a room at Kinston, North Carolina, and ate his meals in restaurants. During 1953 he expended $262.50 for room and board. The distance from Raleigh to Kinston by automobile is approximately 78 miles. The cost to him, under his car-pool arrangement, for transportation from Kinston to Raleigh upon termination of his work in Kinston was $1.09. (Pet. 7a.)

During the remainder of 1953, Stines worked for various employers around Raleigh, plus about three weeks at Charleston, South Carolina, and 7½ weeks at Fort Bragg, North Carolina. (Pet. 7a–8a.)

The taxpayer John S. Hall and his wife have three minor children and maintained a residence in Raleigh, North Carolina, for approximately four years ending in the early part of 1954. During all of 1953, the wife and three children actually resided there. (Pet. 8a.)

From October 21, 1952, through July 10, 1953 (8½ months), Hall was employed by the Grinnell Company to work on the duPont plant at Kinston, North Carolina. He resigned for personal reasons. While work-

ing on the duPont plant at Kinston, he expended $530.13 for room and board during the period January 1, 1953, through July 10, 1953. During this time, he returned to Raleigh on weekends. The cost to him of his transportation from Kinston to Raleigh after termination of his employment was $2.01. (Pet. 9a.)

Prior to his employment at Kinston in 1952, Hall was employed by the Grinnell Company to work on the Burlington Mills plant at Neuse, North Carolina, and worked at that project until it was completed in that year. After his employment at Kinston, in 1953, 1954, and 1955, he worked on a single project in Raleigh for nearly eight months; then at Portsmouth, Ohio, for about 3½ months; at Aiken, South Carolina, for about two weeks; at Hopewell, Virginia, for about seven months; at Tarboro, North Carolina, for one month; and at Moncure, North Carolina, on two successive jobs of three months each. (Pet. 9a.)

In their returns for 1953, all of the taxpayers deducted the expenses of room and board during that year at Kinston and their cost of transportation to return to their family residences at the end of the employment. The Commissioner disallowed the deductions on the ground that they were personal and living expenses. (Pet. 7a, 8a, 9a.)

The Tax Court held that the taxpayers' employment at Kinston was temporary and allowed the claimed deductions as travel expenses under Section 23 (a) (1) (A) of the Internal Revenue Code of 1939. (Pet. 10a–14a.) The Court of Appeals unanimously reversed. (Pet. 15a–21a.)

ARGUMENT

Taxpayers' assertions that the decision below presents an important question (Pet. 11–21) are premised chiefly on repeated statements that the court below based its decision on the ground that a taxpayer's "home," for the purposes of Section 23 (a) (1) (A) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 9), means the taxpayer's "place of employment." The holding below is not that broad.

The court expressly assumed that expenses incurred in connection with employment "away from the established tax home" are deductible if the employment is "temporary" as distinguished from "indeterminate" (Pet. 20a), but denied the claimed deductions on the ground that the Tax Court's finding that taxpayers' employment at Kinston was temporary was clearly erroneous (Pet. 21a). The effect is a holding that the place of a taxpayer's *indefinite* employment is a "home" under Section 23 (a) (1) (A), but the decision below does not present the broader question which taxpayers ask this Court to consider.

The limited nature of the holding below also precludes any conflict with the Ninth Circuit's decision in *Wallace* v. *Commissioner*, 144 F. 2d 407, principally relied upon by the taxpayers (Pet. 11–12). In *Wallace*, which has never been followed by the other courts of appeals, it was held that a movie actress domiciled in San Francisco was entitled to a deduction for the expenses she incurred in Hollywood during a six months' period while engaged in making a motion picture. The Ninth Circuit there held that "home" means domicile or legal residence, rather than

the place of employment. But the case involved "temporary" employment (p. 410).

In contrast, the decision below is based on the ground that taxpayers' employment, in the circumstances of this case, was indefinite rather than temporary. And it has been recognized for years and in numerous cases that the requirements for the deduction of travel expenses are not satisfied if a taxpayer establishes a residence for his family (or a place of business) in one locality and then goes off for an indefinite period to work in another locality. See *Barnhill* v. *Commissioner*, 148 F. 2d 913 (C. A. 4th); *Ney* v. *United States*, 171 F. 2d 449 (C. A. 8th), certiorari denied, 336 U. S. 967; *Carragan* v. *Commissioner*, 197 F. 2d 246 (C. A. 2d); *York* v. *Commissioner*, 160 F. 2d 385 (C. A. D. C.); *Milne* v. *Commissioner*, decided September 29, 1949 (1949 P-H T. C. Memorandum Decisions, par. 49,231), affirmed *per curiam*, 181 F. 2d 503 (C. A. 3d); *Carroll* v. *Commissioner*, 20 T. C. 382; *Bark* v. *Commissioner*, 6 T. C. 851; *Warren* v. *Commissioner*, 13 T. C. 205. If a taxpayer's employment at any particular place can be characterized as indefinite, that is his home for tax purposes, and his expenses are therefore not incurred while away from home. *Barnhill* v. *Commissioner, supra; Bercaw* v. *Commissioner*, 165 F. 2d 521 (C. A. 4th); *O'Toole* v. *Commissioner*, 243 F. 2d 302 (C. A. 2d); *Ney* v. *United States, supra; Carroll* v. *Commissioner, supra; Bark* v. *Commissioner, supra.*

The reasons given by taxpayers for their assertion (Pet. 12–18) that the decision below is in conflict with this Court's decision in *Commissioner* v. *Flowers*, 326

U. S. 465, are all patently without merit. In *Flowers* this Court (p. 472) expressly refrained from deciding the meaning of "home" in Section 23 (a) (1) (A).

CONCLUSION

The disposition of this case by the court below was primarily on a factual basis. The court's decision is correct, and no conflict of decisions or important question is involved. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1958.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. *Gross income.*

* * * * *

(n) [As added by Section 8 (a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *Definition of "Adjusted Gross Income".*—As used in this chapter the term "adjusted gross income" means the gross income minus—

* * * * *

(2) *Expenses of travel and lodging in connection with employment.*—The deductions allowed by section 23 which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee;

* * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 23. *Deductions from gross income.*

In computing net income there shall be allowed as deductions:

(a) [As amended by Section 121 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including * * *; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *.

* * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

SEC. 24. *Items not deductible.*

(a) *General rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23 (x);

* * * * *

(26 U. S. C. 1952 ed., Sec. 24.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

SEC. 39.22 (n)–1. *Adjusted gross income.* (a) The term "adjusted gross income" means the gross income computed under section 22 minus such of the deductions allowable under section 23 as are specified in section 22 (n). * * *

(b) Section 22 (n) does not create any new deductions, but merely specifies which of the deductions provided in section 23 shall be allowed in computing adjusted gross income. The circumstance that a particular item is specified in one of the clauses under section 22 (n) and is also embraced within the terms of another of such clauses does not permit the item to be twice deducted in computing adjusted gross income.

(c) The deductions specified in section 22 (n) for the purpose of computing adjusted gross income are: (1) Deductions allowable under section 23, which are attributable to a trade or business carried on by the taxpayer not consisting of services performed as an employee; (2) deductions allowable by section 23 which constitute expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee; (3) deductions allowable by section 23 (other than ex-

penses of travel, meals, and lodging while away from home) which consist of expenses paid or incurred in connection with the performance of services as an employee under a reimbursement or other expense-allowance arrangement with his employer; * * *

(d) For the purpose of the deductions specified in section 22 (n) the performance of personal services as an employee does not constitute the carrying on of a trade or business. * * *

* * * * *

SEC. 39.23 (a)–1. *Business expenses.* Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than subsection (a) of section 23. Double deductions are not permitted. Amounts deducted under one provision of the Internal Revenue Code cannot again be deducted under any other provision thereof. * * * Among the items included in business expenses are * * * traveling expenses while away from home solely in the pursuit of a trade or business * * *. * * *

SEC. 39.23 (a)–2. *Traveling expenses.* (a) Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. * * *

* * * * *

(f) Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted.

(g) A taxpayer claiming the benefit of the deductions referred to in this section must attach to his return a statement showing (1) the nature of the business in which engaged; (2) the number of days away from home during the

taxable year on account of business; (3) the total amount of expenses incident to meals and lodging while absent from home on business during the taxable year; and (4) the total amount of other expenses incident to travel and claimed as a deduction.

(h) Claim for the deductions referred to in this section must be substantiated, when required by the Commissioner, by evidence showing in detail the amount and nature of the expenses incurred.

(i) Commuters' fares are not considered as business expenses and are not deductible.